Complying with the Endangered Species Act

A Practical Guidance® Practice Note by
Parker Moore, Katrina Krebs, and Jonas Reagan, Beveridge & Diamond PC

Parker Moore
Beveridge & Diamond PC

Katrina Krebs
Beveridge & Diamond PC

Jonas Reagan
Beveridge & Diamond PC

This practice note provides an overview of the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., and discusses the obligations of real estate developers and property owners with respect to the ESA. Congress enacted the ESA in 1973 to protect and recover imperiled species and their habitats. The U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) together administer the ESA. FWS has jurisdiction over terrestrial and freshwater species, whereas NMFS has jurisdiction over marine wildlife and anadromous fish (fish that live the majority of their life in the sea but for spawning in freshwater). More than 1,600 species are currently listed as endangered or threatened under the ESA in the United States.

The presence of an endangered or threatened species on private or public land that overlaps with real estate development may impose certain duties, such as avoiding unauthorized take and, in the case of federal agencies, requiring consultation with FWS or NMFS before issuing a federal permit or other authorization that may affect those species. The ESA broadly defines "take" to include a broad range of actions, such as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect an endangered wildlife species, or any attempt to engage in such conduct. 16 U.S.C. § 1532(19). As violation of the ESA's prohibition on unauthorized take can lead to civil and criminal penalties if unauthorized take occurs, property owners and developers should take the necessary steps to ensure ESA compliance early in the real estate development planning stages. Real estate developers must also understand the requirements imposed by the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, the Lacey Act, and other federal laws, as well as state species protection laws, though these are beyond the scope of this practice note.

For a full listing of related climate change content, see Climate Change Resource Kit.

For additional guidance on environmental issues that impact real property development, see Wetlands Regulations: Considerations for Project Developers, Wetlands Protection State Law Survey, Stormwater Permitting and Management Requirements, and Environmental Impact Review in Real Estate Transactions.

Listing Species and Designating Critical Habitat

A species, subspecies, or distinct population segment of a species may be listed as endangered or threatened under Section 4 of the ESA upon petition or by voluntary review by the Services. Endangered species are those that FWS or NMFS determines to be in danger of extinction throughout all or a significant portion of their range. In comparison, threatened species are those that are likely to become endangered in the foreseeable future—meaning so long as the Services can reasonably determine that the future threats and species' responses are likely (i.e., not simply speculative).

Species Listing Process

Individuals or organizations may initiate the species listing process by submitting a petition to FWS or NMFS explaining why they believes a particular species should be classified as threatened or endangered. The agency then must determine within 90 days, to the extent practicable, whether there is substantial information indicating that listing the species may be warranted. If it makes an affirmative 90-day finding, FWS or NMFS then must complete a Species Status Assessment within 12 months, evaluating whether listing the species is (1) warranted, (2) warranted but precluded as other species are of higher listing priority, or (3) not warranted (known as a 12-month finding). In practice, however, the Services often miss these deadlines, resulting in legal challenges from the petitioning party.

If FWS or NMSF determines that listing is warranted, it must publish a proposed rule to list the species in the Federal Register and solicit public comment for 60 days. Real estate owners and other stakeholders may wish to comment on the proposed rule if the species occurs within their property, they believe the species may be affected by their activities, or they believe the proposed listing is not appropriate or should be downgraded (i.e., from endangered to threatened). The Services analyze all public comments and publish a final rule in the Federal Register listing the species, assuming they still believe listing is warranted. The listing will take effect no sooner than 30 days after publication.

If the agency determines that listing the species is warranted but precluded, the species becomes a candidate for future listing. Candidate species are not protected under the ESA but are subject to special review requirements under Section 7 of the ESA. The Services must annually reassess a candidate species' status to determine whether its listing priority should change.

The Services follow a similar procedure when voluntarily choosing to list a species or when delisting or changing a species' listing status.

Species Listing Criteria

The Services determine whether listing a species as threatened or endangered is warranted based on the following factors:

- The present or threatened destruction, modification, or curtailment of the species' habitat or range
- Overutilization for commercial, recreational, scientific, or educational purposes
- Disease or predation
- The inadequacy of existing regulatory mechanisms – and–
- Other natural or artificial factors affecting the species' continued existence

While it has long been understood that the Services may not consider economic impacts in deciding whether to list a species, they revised their regulations in 2019 to include agency discretion to publish economic impact information in the listing decision for transparency purposes. These amended regulations were quickly challenged in federal court and, at the Services' request, have been remanded to the agencies for further consideration. While the 2019 regulations remain in effect during the remand, the Biden administration has made clear it intends to rescind them and plans to propose new regulations as soon as May 2023. Notwithstanding that regulatory wrangling, a listing decision may only be based on the best available science, which initially is compiled in the Species Status Assessment and must be supplemented whenever additional information meeting this standard becomes available. The Species Status Assessment can thus serve as a valuable resource for the regulated community to identify information about a species' current condition, its range and habitat, and the threats to the species.

The ESA directs the Services to review all listings every five years to determine whether the species should be reclassified or delisted based on the factors listed above. Delisting rarely occurs—only about 1% of species have been delisted to date.

Designating Critical Habitat

The ESA directs the Services to designate to the maximum extent prudent and determinable critical habit for listed species, meaning geographic areas essential to the species' conservation. The Services have been unable to keep pace with this obligation, having designated critical habitat for fewer than 900 species to date. Critical habitat, which may include public and private lands, is generally not coextensive with the entire range occupied by the listed species. It instead is limited to:

- Occupied habitat containing physical or biological features essential to the conservation of the species that may require special management considerations or protection –and–
- Unoccupied habitat that the Services determine are essential for the conservation of the species

The ESA regulations, most recently revised in 2019, further restrict areas that may be designated as critical habitat. Unoccupied habitat may only be designated as critical habitat where (1) the designation of all occupied areas as critical habitat is inadequate to ensure the conservation of the species, (2) it is reasonably certain that the unoccupied habitat will contribute to the species' conservation, and (3) it is reasonably certain that the unoccupied area contains physical or biological features essential to the species' conservation. Again, the 2019 revised regulations were quickly challenged in federal court and, at the Services' request, have been remanded to the agencies for further consideration. While the 2019 regulations remain in effect during the remand, the Biden administration has made clear it intends to rescind them and plans to propose new regulations as soon as May 2023.

Unlike the listing process, critical habitat must be based on the best available science, after taking into consideration economic impacts, national security, and other considerations.

Prohibited Acts

Section 9 of the ESA bans the import, export, transport, and sale of endangered fish, wildlife, and plants in interstate and foreign commerce. Public and private individuals and organizations are further prohibited from engaging in the acts described below. Real estate owners and developers must understand these prohibitions because violations can result in civil and criminal liability.

Endangered Fish and Wildlife Prohibitions

The intentional or unintentional take of endangered fish and wildlife species without authorization is prohibited under Section 9 on private and public lands. The ESA broadly defines take as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a species, or to attempt to engage in any such conduct.

Harassment refers only to intentional or negligent acts that create a likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns. FWS recently recognized that harassment does not include incidental take that results from otherwise lawful activities. By contrast, harm requires that the individual or organization actually kill or injure wildlife through, for example, significant habitat modification that significantly impairs essential behavioral patterns. Harm can include incidental take, but mere potential to harm a species does not constitute take.

Endangered Plant Prohibitions

The ESA's protection of endangered plants is more limited than that for endangered wildlife because the take prohibition does not extend to plant species. Nevertheless, individuals or organizations may not remove, possess, or maliciously destroy or damage endangered plants on federal land. Furthermore, these parties are prohibited from removing, cutting, digging up, damaging, or destroying endangered plants on private property in knowing violation of any state law or regulation.

Threatened Species Prohibitions

The ESA does not automatically extend these prohibitions to threatened wildlife and plant species. Section 4(d) instead gives the Services the authority to issue regulations necessary and advisable to provide for the conservation of threatened species.

Pursuant to this authority, in 1978, FWS (but not NMFS) issued a blanket 4(d) rule extending the take prohibition to all threatened wildlife species unless FWS has promulgated a specific 4(d) rule for a species prescribing different treatment. FWS revised its ESA regulations in 2019, however, and withdrew the blanket 4(d) rule going forward, restoring the ESA's distinction between endangered and threatened wildlife species in future listing decisions. For newly listed threatened wildlife species, if FWS determines that a take prohibition or other protection is necessary, it will promulgate a species-specific rule establishing that prohibition or protection. Otherwise, take of a wildlife species newly listed as threatened after September 26, 2019, is not prohibited. Take of previously listed threatened wildlife species still is prohibited by regulation absent FWS authorization or a species-specific 4(d) rule. These revised regulations were quickly challenged in federal court and, at the Services' request, have been remanded to the agencies for further consideration. While the FWS's 2019 regulation

eliminating the blanket 4(d) rule remain in effect during the remand, the Biden administration intends to rescind it and plans to propose a new replacement regulation as soon as May 2023 to reinstate the blanket 4(d) rule so that the ESA's take prohibition will once again apply to all threatened wildlife species.

Because NMFS never adopted a blanket 4(d) rule, for the time being, FWS's 2019 regulations create more consistent regulation of threatened species between the agencies.

Section 7 Consultation

Section 7 of the ESA requires federal agencies to consult with FWS or NMFS whenever they carry out, fund, or authorize an action that may affect any threatened or endangered species or cause the destruction or adverse modification of designated critical habitat for any listed species. Section 7 consultation most frequently affects the regulated community when private activities require a federal permit or are planned to occur on federal lands, all of which trigger an obligation for the authorizing federal agency to consult with FWS or NMFS before the agency may permit the activity if a listed species may be affected. Consultation ensures that federal agency authorization of the activity will not jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat.

To determine whether consultation is necessary, real estate owners and developers and the federal action agency first identify any endangered or threatened species or critical habitat in the project area. FWS's Information for Planning and Conservation (IPaC) database is a helpful resource that can provide general species and critical habitat location information. The IPaC database is not definitive, however, and real estate owners and developers should consider surveying their lands for suitable listed species habitat and/or the species themselves.

If no listed species or critical habitat occurs within the project area and/or the action agency determines that the proposed federal action will have no effect on listed species or critical habitat, Section 7 consultation is not required. The federal action agency does not need to seek the Services' concurrence in making a "no effect" determination but may choose to confer with FWS or NMFS. If, on the other hand, the action agency determines that the proposed federal action may affect a listed species or critical habitat, it must proceed with Section 7 consultation.

Informal Consultation

Federal action agencies engage in informal consultation with the Services to determine whether their proposed actions may affect a listed species or critical habitat. Informal consultation results in the issuance of a biological assessment by the action agency, which identifies potential impacts to endangered or threatened species and critical habitat.

Informal consultation ends if the action agency finds, and FWS or NMFS concurs, that the agency action (1) will have no effect on any listed species or critical habitat or (2) that it may affect but is not likely to adversely affect any listed species or critical habitat. Under the 2019 ESA regulations, the Services have 60 days after receiving a written request from the action agency to concur that the project is not likely to adversely affect listed species or critical habitat––though, again, the 2019 regulations were quickly challenged in federal court and, at the Services' request, have been remanded to the agencies for further consideration. While the 2019 regulations remain in effect during the remand, the Biden administration has made clear it intends to rescind them and plans to propose new regulations as soon as May 2023.

Property owners and developers may wish to adopt avoidance and minimization measures to ensure that the action agency makes a not likely to adversely affect finding and, thus, avoids the need for formal consultation. Avoidance and minimization measures are developed by conferring with the involved state and federal agencies and may include timing restrictions and best management practices. For example, for the federally endangered Indiana bat, which roosts in trees during summer, property owners and developers may restrict tree removal to the time of year when bats are not likely to be present, direct temporary lighting away from bat habitat, and use bright colored flagging or fencing to ensure that tree clearing only occurs in the specified areas.

In contrast, if the action agency finds that the project is likely to adversely affect some or all listed species or critical habitat, it must initiate formal consultation with FWS or NMFS.

Formal Consultation

After receiving the request for formal consultation, FWS or NMFS initiates consultation once the agency determines that it has a complete initiation package. A complete initiation package includes:

- A description of the proposed action and its duration, timing, and location
- Maps or blueprints
- Information from the action agency or project proponent about the impacts to listed species or critical habitat
- Other relevant information

FWS or NMFS must then complete consultation within 135 days unless this period is extended by the action agency or, if the extension is for more than 60 days, by consent of the property owner. The Services may seek information, such as data about potential effects to species, from the property owner throughout the consultation process.

Formal consultation concludes with the issuance by FWS or NMFS of a biological opinion, which is based on the best available science and examines the potential impacts of the agency action as compared to the environmental baseline and cumulative effects. The biological opinion determines whether the project will result in jeopardy to endangered or threatened species or the destruction or adverse modification of critical habitat.

Actions that are likely to adversely affect a listed species or critical habitat may proceed so long as they do not result in jeopardy or destruction/adverse modification. In these circumstances, the Services issue an incidental take statement that exempts a specified amount of incidental take (i.e., take that results from but is not the purpose of the project) from the ESA's take prohibition and mandates that the property owner adopt reasonable and prudent measures to minimize species impacts.

While extremely rare, actions that FWS or NMFS determines will result in jeopardy or adverse modification may not proceed unless one of two requirements is met:

- The Services propose reasonable and prudent alternatives that avoid jeopardy and adverse modification –or–
- The action agency receives a rarely granted exemption from a committee of federal officials, referred to as the "God Squad"

Contents of a Biological Opinion

Potential impacts. The Services were previously required to consider the direct, indirect, interrelated, and interdependent effects of the project on endangered and threatened species and critical habitat. However, the revised ESA regulations issued in 2019 instead specify that the Services must evaluate the consequences of the project that would not occur "but for" the proposed action and that are reasonably certain to occur. Once again, the Services are working to revise many of these provisions.

Environmental baseline. The environmental baseline is defined as the condition of the listed species or critical habitat in the action area, without the consequences to the listed species or critical habitat caused by the proposed development. The environmental baseline includes:

- The past and present impacts of a federal, state, and private actions and other human activities in the project area
- The anticipated impacts of all proposed federal projects in the project area that have already undergone formal or early Section 7 consultation –and–
- The impact of contemporaneous state or private actions

The 2019 ESA regulations explicitly include the consequences of ongoing agency action or existing agency facilities not within the agency's discretion to modify in the environmental baseline. These regulations currently control, but forthcoming regulatory revisions could impact environmental baseline analyses.

Cumulative effects. Cumulative effects are defined differently under the ESA than in other contexts, such as under the National Environmental Policy Act (NEPA). The ESA provides that cumulative effects are the effects of proposed action, together with other state or private (but not federal) activities, which are reasonably certain to occur.

Best available science. FWS and NMFS must base their analysis in their biological opinions on the best available science, which may include species and habitat surveys, information from previous biological opinions, the Species Status Assessment, and other scientific studies. In some circumstances where the best available science does not adequately allow the Services to predict species impacts, the Services may work with the action agency and project proponents to request development of additional species information, but the action agency does not necessarily have to develop new information to comply with the best available science standard.

Conference reports. Species proposed for listing and proposed critical habitat areas also undergo Section 7 review, though it is not as demanding as the Section 7 consultation process. Specifically, the ESA requires a federal action agency to confer with FWS or NMFS if a proposed federal action could jeopardize the continued existence of a proposed species or cause destruction or adverse

modification of proposed critical habitat. The conference may result in the issuance of a conference opinion containing preliminary findings of no jeopardy or no adverse modification and recommending means of avoiding and minimizing potential adverse impacts. Project owners and developers can benefit from the issuance of a conference report because, if the species is listed or the critical habitat is designated before the project is complete, FWS or NMFS may adopt the conference opinion as the biological opinion, avoiding the need to reinitiate Section 7 consultation.

Reinitiation of Consultation

The Section 7 consultation requirement does not end once FWS or NMFS issues the biological opinion and incidental take statement. The action agency must continue to evaluate new information about potential impacts from the federal action for as long as that action agency retains discretionary involvement or control over the action (e.g., in the case of a federal permit, for as long as the permit remains in effect) and must reinitiate consultation if one of the following conditions is met:

- The amount or extent of taking specified in the incidental take statement is exceeded
- New information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered
- The identified action is subsequently modified in a manner or to an extent that causes an effect to the listed species or critical habitat not previously considered in the biological opinion –or–
- A new species is listed or critical habitat is designated that may be affected by the identified action

Reinitiation of consultation may occur formally or informally, depending on the likelihood of new species or critical habitat impacts, and must be requested by the action agency—though FWS or NMFS may suggest that the action agency request reinitiation.

Irreversible and Irretrievable Commitment of Resources

Section 7(d) limits the project activities that may proceed after the Services initiate or reinitiate consultation. It prohibits federal action agencies and project owners from making any irreversible or irretrievable commitment of resources that has the effect of foreclosing the formulation or implementation of reasonable and prudent measures deemed necessary to avoid jeopardy or adverse modification. Non-jeopardizing activities (i.e., those not expected to cause take) may therefore proceed during the consultation and reinitiated consultation processes.

In some circumstances, the action agency may choose to prepare a Section 7(d) determination that identifies the activities that may proceed during consultation. Oftentimes, an action agency will solicit technical assistance from FWS or NMFS when developing a 7(d) determination. While the Services typically welcome such requests to provide guidance, they generally do not review or formally approve final Section 7(d) determinations.

Incidental Take Permits and Habitat Conservation Plans

Property owners and developers should consider applying for (but are not required to) an incidental take permit under Section 10 of the ESA for private activities that do not require federal permits and are reasonably certain to take listed fish and wildlife to ensure that their activities comply with the ESA. (An incidental take permit is not necessary for private activities that are reasonably certain to affect listed plant species as the ESA does not prohibit their take.) An incidental take permit, which must be supported by an applicant-prepared habitat conservation plan (HCP), authorizes a specified amount of take to provide the property owner with greater certainty and flexibility.

Incidental take permits further benefit property owners and developers by providing assurances that—in the event that unforeseen circumstances arise—the Services will not require the commitment of additional land, water, or financial compensation or further restrict the use of land, water, or natural resources beyond the level agreed to in the HCP without the property owner's consent. The Services honor these "No Surprises" assurances so long as the project owner implements the terms and conditions of the HCP, incidental take permit, and any other associated documents in good faith.

Habitat Conservation Plans

HCPs are a key component of an application for an incidental take permit and become binding following the issuance of the permit. They are a detailed plan of development that ensure the impacts of the authorized incidental take are adequately minimized and mitigated. Each HCP must address the following:

- The potential effects of the proposed taking
- Monitoring, minimizing, and mitigating impacts, such as through payments into an established conservation fund or enhancement of degraded or former habitat
- Funding the HCP
- Procedures to deal with unforeseen or extraordinary circumstances

- Alternative actions to the taking and an explanation as to why the property owner or developer is not adopting these alternatives –and–
- Other measures that the Services deem necessary or appropriate

HCPs need not be limited to listed fish and wildlife species—they may cover any species regardless of listing status so long as least one fish or wildlife species is listed as endangered or threatened. That said, in February 2023, the Services proposed new Section 10 regulations to clarify the treatment of non-listed species under HCPs. Barring any significant changes in the final revised Section 10 regulations, property owners and developers therefore should consider including candidate species or species proposed for listing in HCPs so that they can receive incidental take authorization for those species once the listing takes effect. Property owners and developers must recognize, however, that this approach may require them to implement minimization and mitigation measures that might not be otherwise required.

Property owners and developers are encouraged to engage a consultant and regularly meet with FWS or NMFS when developing an HCP. Drafting the HCP is an iterative process that involves negotiating its size and scope with the Services.

Approving an Incidental Take Permit Application

The Services must comply with NEPA's requirements before issuing an incidental take permit. HCPs with minor potential impacts to the environment might qualify for a categorical exclusion, meaning further environmental analysis is not required under NEPA. For HCPs with more significant potential effects on resources, NMFS or FWS (or, to expedite the permit application process, the property owner with oversight by the Services) prepares an environmental assessment or environmental impact statement.

Incidental take permits also are subject to Section 7 of the ESA, meaning that FWS or NMFS must consult with itself before issuing the permit. FWS or NMFS issues a biological opinion evaluating the potential impacts of the HCP and determining whether it will result in jeopardy or adverse modification. Based on the Services' long-standing position, property owners and developers may not cover only one listed fish or wildlife species in the HCP and rely on this intra-Service consultation to exempt take of other listed species with an incidental take statement.

The Services provide a 60-day period for public comment on the incidental take permit application and the NEPA analysis. Following this comment period, the Services issue the permit after finding:

- The taking will be incidental to the project
- Impacts will be minimized and mitigated to the maximum extent practicable
- Adequate funding exists
- The taking will not appreciably reduce the survival and recovery of the species –and–
- Any other necessary measures are met

The term of the incidental take permit can be of any duration and may be negotiated with the Services. But the agencies typically have a preference for permits of 10 years or less because they offer the greatest level of certainty of species impacts.

Candidate Conservation Agreements with Assurances and Safe Harbor Agreements

Landowners may be reluctant to improve habitats for listed or candidate species or take other actions that would encourage such species to inhabit their property and potentially limit the activities that can lawfully be conducted there. Candidate conservation agreements with assurances (CCAAs) and safe harbor agreements, however, encourage property owners to take beneficial actions for these species while providing assurance that they will not be subject to additional restrictions due to their voluntary conservation actions. Participating in a CCAA or a safe harbor agreement can therefore offer a net benefit to species and provide greater certainty in the project development process. In February 2023, the Biden administration proposed revisions to the Section 10 regulations that would consolidate CCAAs and safe harbor agreements into a new "Conservation Benefit Agreement" to simplify and improve the currently-separate processes. It remains uncertain whether and when the proposed regulations will be finalized.

Candidate Conservation Agreement with Assurances

Property owners may participate in a CCAA when their property includes a candidate species, a species proposed for listing, or an at-risk species that may become a candidate in the near future in order to address concerns about the potential regulatory implications of listed species presence. By agreeing to a CCAA, landowners can obtain

an enhancement of survival permit that provides that, if they implement the proactive conservation measures, they will not be subject to restrictions beyond that in the CCAA without their consent if the species becomes listed as endangered or threatened in the future. Examples of beneficial activities include restoring or enhancing habitat, expanding habitat connectivity, and controlling invasive plants or wildlife.

A CCAA may cover one or multiple species and need only address threats that property owners can control on their property. A CCAA may be developed in coordination with the Services in six to nine months or longer depending on its complexity.

Safe Harbor Agreement

Safe harbor agreements are voluntary agreements between the Services and property owners whose actions contribute to the recovery of a species already listed as endangered or threatened. In exchange for fulfilling the requirements of the safe harbor agreement by implementing actions (similar to those implemented under a CCAA) that aid in the recovery of the listed species, the property owner receives formal assurances through an enhancement of survival permit that the Services will not require additional management activities without the property owner's consent. The enhancement of survival permit also authorizes incidental take of a species that may result from the conservation actions undertaken by the property owner under the safe harbor agreement.

As with CCAAs, a safe harbor agreement may be developed in coordination with the Services in six to nine months or longer depending on the complexity of the agreement.

Civil and Criminal Enforcement

Property owners and developers must understand the potential impacts of their activities on listed species as an unauthorized take of a listed fish or wildlife species may be subject to civil or criminal liability under Section 11 of the ESA. An individual or organization may receive fines or imprisonment, as well as the additional penalties described below, for each violation—meaning each individual of a listed animal species taken without authorization—of Section 9.

While the ESA imposes liability for Section 9 violations related to listed plant species, it does not prohibit the take of such plants; therefore, this section focuses on liability for the unauthorized take of animal species.

Civil Liability

As of 2023, the ESA authorizes FWS to assess the following civil penalties for each violation of the take prohibition:

- $61,982 for knowingly taking an endangered animal
- $29,751 for knowingly taking a threatened animal –or–
- $1,566 for otherwise violating a provision of the ESA, including by negligently harassing a listed animal or unintentionally taking a listed species

A knowing act only requires a general intent to commit the act impacting the species. A defendant need not know that the species is endangered or threatened or intend to violate the ESA to be held liable.

Criminal Liability

The Services may criminally prosecute an individual or organization when it knowingly takes a listed animal species in violation of Section 9. Knowingly taking an endangered animal is a Class A misdemeanor that may result in imprisonment of no more than one year and/or a fine. Under the ESA, a fine for a Class A misdemeanor is no more than $50,000. The Criminal Fine Improvements Act increases this amount to $100,000 for an individual or $200,000 for an organization.

Knowingly taking a threatened animal is a Class B misdemeanor that may result in imprisonment of no more than six months and/or a fine. The ESA authorizes a fine of no more than $25,000 for a Class B misdemeanor, whereas the Criminal Fine Improvements Act authorizes a fine of no more than $5,000 for an individual or $10,000 for an organization. In a nonbinding opinion, a federal district court has held that the penalty amount in the ESA controls over that in the Criminal Fine Improvements Act. See United States v. Eisenberg, 496 F. Supp. 2d 578, 583 (E.D. Pa. 2007). However, this remains an unsettled issue.

Additional Penalties

The ESA further authorizes the federal government, as well as citizens, to seek additional remedies for the unauthorized take of listed animal species, including the following:

- The attorney general or citizen may seek to enjoin the activity causing the take
- A federal agency that issued a lease, license, permit, or other agreement authorizing the use of federal lands to a person convicted of a criminal ESA violation may immediately modify, suspend, or revoke the lease, license, permit, or other agreement
- All equipment, vehicles, and other means of transportation used to aid the taking are subject to forfeiture after a person is convicted of a criminal violation –and–
- The federal government may seek restitution for ESA violations or impose conditions of probation on the individual or organization

ESA Section 11(g) – Citizen Suits

The ESA also gives the public the right to bring a citizen suit to enforce the statute's provisions. Under Section 11(g), citizens may file a civil suit to:

- Enjoin any person or organization, including a federal or state agency, alleged to be in violation of the ESA –or–
- Compel the Services to enforce the ESA's take prohibitions or to list a species or designate critical habitat

A 60-day notice of intent to sue is a prerequisite to bringing a citizen suit. The notice requirement is intended to give the alleged violator or the Services time to redress the violation and potentially avoid the lawsuit.

Parker Moore, Partner, Beveridge & Diamond PC

Parker guides complex projects to successful completion.

His environmental law practice is an outgrowth of his love for the natural world. He co-chairs Beveridge & Diamond's Natural Resources and Project Development Practice Group and its NEPA, Wetlands, and Endangered Species Act groups.

Parker dedicates his practice to successful project development, advising clients nationwide on activities implicating NEPA, wetlands regulation, and federal and state species protection laws, including the Endangered Species Act, Migratory Bird Treaty Act, Bald and Golden Eagle Protection Act, and CITES. He also defends clients against agency enforcement actions and citizen suits, applying his substantive knowledge of natural resources law and project development to craft creative, sound, and successful legal strategies.

Parker brings a balanced approach to working on high profile projects to meet the objectives of developers and the legal demands of state and federal regulators. Clients involve him at all stages of project development, from initial project conception and design to defense of completed facilities. He frequently is called on to help get projects back on track when they are delayed by permitting complications and other regulatory issues, bringing to bear his extensive experience to identify innovative and effective solutions. In all cases, Parker's goal is to help his clients complete legally-defensible projects on time and on budget.

Before joining B&D, Parker clerked at the White House Council on Environmental Quality. He also is a professionally-trained wetlands ecologist and has years of experience identifying wetlands, obtaining jurisdictional determinations from the U.S. Army Corps of Engineers, surveying for protected species, and drafting NEPA documents.

Katrina Krebs, Associate, Beveridge & Diamond PC

As a Deputy Co-Chair of the firm's Litigation practice group and Waste Management & Recycling practice group, Katrina's practice focuses on defending state and federal class and mass actions, citizen suits, and enforcement actions. Her experience spans opposing class certification with strong expert evidence, seeking dismissal of nuisance and negligence claims, advocating for her clients in administrative hearings, and litigating agency approvals for projects.

Katrina is also versed in NEPA issues, wetlands regulation, federal species protection laws, and land use law. She helps clients navigate permitting processes for large interstate projects and work with state and federal regulators to achieve their project goals.

In advising clients, she draws on her experience with the U.S. Fish & Wildlife Service on national wildlife refuges in Arizona, Colorado, and Wyoming, and as a law clerk with the federal government. Before joining Beveridge & Diamond, Katrina clerked for the U.S. Department of Justice in the Environment & National Resources Division and the U.S. Environmental Protection Agency in the Office of Enforcement & Compliance Assurance.

Katrina's experience includes:

- Obtaining dismissal of three putative class actions alleging landfills emitted nuisance odors before class certification practice.
- Defeating class certification in a federal action against a waste-to-energy facility alleging nuisance odors.
- Serving as ESA counsel to the developers of the Mountain Valley Pipeline — a $5 billion, 304-mile FERC jurisdictional pipeline extending from Wetzel County, West Virginia to Pittsylvania County, Virginia.
- Advising oil and gas clients on compliance with NEPA, the ESA, and the CWA.

Jonas Raegan, Associate, Beveridge & Diamond PC

He advises clients on regulatory compliance, administrative enforcement actions, and civil litigation under state and federal regulations including the Clean Water Act, Endangered Species Act, Administrative Procedure Act, Pipeline Safety Act, General Mining Act of 1872, and Federal Land Management Policy Act.

Before joining Beveridge & Diamond, Jonas served as an Attorney-Advisor for the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Chief Counsel where he provided counsel on enforcement actions under the Pipeline Safety Act. Before that, Jonas practiced as an associate with a boutique natural resources firm, where he counseled a variety of private, government, and investment clients on environmental and water issues facing western states focusing on environmental permitting and compliance, state and federal regulation, Columbia River Treaty, government contracts, as well as general legal support for projects ranging from business dissolution to protecting grazing and mineral rights. His background includes extensive coursework in climate change, ecology, fisheries, and environmental science.